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Report of Working Group II (Dispute Settlement) on the work of its seventy-sixth session (Vienna, 10-14 October 2022)

Contents

I. Introduction

1. At its fifty-fifth session in 2022, the Commission entrusted the Working Group to develop a guidance text on early dismissal and preliminary determination as provided in the note by the Secretariat (A/CN.9/1114) and to present it to the Commission for its consideration at its fifty-sixth session in 2023.[1]

2. At that session, the Commission further entrusted the Working Group to consider the topics of technology-related dispute resolution and adjudication jointly.[2] The Working Group was requested to explore the commonalities that exist in the proposals regarding work on technology-related dispute resolution and adjudication and, in that context, prepare model provisions, clauses, or other forms of legislative or non-legislative text, where appropriate.[3] The Working Group was requested to consider ways to further accelerate the resolution of disputes by incorporating elements of both proposals. The Commission further agreed that the work should build on the UNCITRAL Expedited Arbitration Rules ("Expedited Rules") and that text could be prepared on matters such as shorter time frames, appointment of experts/neutrals, confidentiality, and the legal nature of the outcome of the proceedings, all of which would allow disputing parties to tailor the proceeding to their needs to further expedite the proceedings. It was stressed that such work should be guided by the needs of the users, take into account innovative solutions as well as the use of technology, and further extend the use of the Expedited Rules.[4]

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its seventy-sixth session in Vienna from 10 to 14 October 2022 at the Vienna International Centre.

4. The session was attended by the following States members of the Working Group: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Morocco, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

5. The session was attended by observers from the following States: Albania, Angola, Azerbaijan, Bahrain, Benin, Bolivia (Plurinational State of), Burkina Faso, Burundi, Egypt, El Salvador, Jordan, Lao People's Democratic Republic, Libya, Madagascar, Malta, Netherlands, Norway, Oman, Philippines, Portugal, Qatar, Sri Lanka, and Sudan.

6. The session was further attended by observers from the following invited international organizations:

(a) *United Nations System*: Economic Commission for Latin America and the Caribbean (ECLAC) and World Health Organization (WHO);

(b) *Intergovernmental organizations*: Asian Clearing Union (ACU), Cooperation Council for the Arab States of the Gulf (GCC), Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS) and Permanent Court of Arbitration (PCA);

[1] *Official Records of the General Assembly*, *Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 22(c), 194(b), and 226-229.
[2] Ibid., para. 22(c).
[3] Ibid., para. 194(b).
[4] Ibid., paras. 223–225.

(c) *Non-governmental organizations*: American Society of International Law (ASIL), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitration Center of the Lima Chamber of Commerce (CA-CCL), Asia Pacific Centre for Arbitration and Mediation (APCAM), Asia Pacific Regional Arbitration Group (APRAG), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Chartered Institute of Arbitrators (CIARB), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), Comité Français de L'arbitrage (CFA), European Law Institute (ELI), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICA), Hong Kong International Arbitration Centre (HKIAC), Hong Kong Mediation Centre (HKMC), Institute for Transnational Arbitration (ITA), Inter-American Arbitration Commission (IACAC-CIAC), Inter-American Bar Association (IABA), International Academy of Mediators (IAM), International Association of Young Lawyers (AIJA), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), International Women's Insolvency and Restructuring Confederation (IWIRC), Israeli Institute of Commercial Arbitration (IICA), Korean Commercial Arbitration Board (KCAB), Madrid Court of Arbitration (MCA), Miami International Arbitration Society (MIAS), New York City Bar Association (NYCBAR), Nigerian Institute of Chartered Arbitrators (NICArb), Panel of Recognised International Market Experts in Finance (P.R.I.M.E Finance), Regional Arbitration Centre for International Commercial Arbitration Lagos-Nigeria (RCICAL), Russian Arbitration Center at the Russian Institute of Modern Arbitration (RAC at RIMA), Shenzhen Court of International Arbitration (SCIA), Singapore International Arbitration Centre (SIAC), Swiss Arbitration Association (ASA) and Tashkent International Arbitration Centre (TIAC).

7. The Working Group elected the following officers:

Chair: Mr. Andrés Jana (Chile)

Rapporteur: Ms. Thi Van Anh LAI (Viet Nam)

8. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.II/WP.226); (b) Note prepared by the Secretariat on early dismissal and preliminary determination (A/CN.9/1114); (c) Note prepared by the Secretariat on technology-related dispute resolution and adjudication (A/CN.9/WG.II/WP.227); and (d) Submission by the Government of Israel on technology-related dispute resolution and adjudication (A/CN.9/WG.II/WP.228).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of early dismissal and preliminary determination.
5. Consideration of technology-related dispute resolution and adjudication.
6. Adoption of the report.

III. Consideration of early dismissal and preliminary determination (A/CN.9/1114)

10. It was recalled that the Commission, at its fifty-fifth session in 2022, had considered the topic of early dismissal and preliminary determination (hereinafter, "early dismissal") based on a note prepared by the Secretariat containing three legislative options (A/CN.9/1114). It was further recalled that after discussion, the

Commission entrusted the Working Group to develop a guidance text on early dismissal on the basis of document A/CN.9/1114 and to present it to the Commission for its consideration at its fifty-sixth session in 2023.[5] Accordingly, the Working Group considered the guidance text in section B.1 of document A/CN.9/1114.

A. Presentation and form

11. At the outset, the Working Group had a preliminary discussion on how the guidance text on early dismissal could be presented and in what form. The discussion evolved around whether the guidance text could be presented as: (i) a standalone text providing guidance within the context of the UNCITRAL Arbitration Rules; or (ii) part of or supplement to the UNCITRAL Notes on Organizing Arbitral Proceedings ("Notes"), which addressed the organization of the arbitration proceedings generally and not necessarily within the context of the UNCITRAL Arbitration Rules. In support of the former approach, it was said that a standalone text could give more visibility to early dismissal highlighting that article 17 of the UNCITRAL Arbitration Rules provided such discretion to an arbitral tribunal. It was said that this approach could accommodate the views that had been expressed in support of preparing a separate rule on early dismissal.

12. However, it was cautioned that such an approach might give undue weight to the topic, which might lead to an increase in the number of pleas for early dismissal. It was further said that the inclusion of the guidance text in the Notes could provide an opportunity to further promote the Notes, which would equally ensure the visibility of the text. The benefits of including the text within an existing text, which described other matters relevant to the organization of the arbitral proceedings and the user-friendliness of such an approach were underlined. It was mentioned that the guidance text would need to be adjusted in order for it to be presented as part of the Notes.

13. After discussion, the Working Group decided to consider the substance of the guidance text with the above-mentioned questions in mind and to determine at a later stage the appropriate form of presentation (see para. 40 below).

B. Guidance text (A/CN.9/1114, section B.1)

14. It was generally felt that the aim of the guidance text should be to inform an arbitral tribunal and the parties that the arbitral tribunal had the discretion to dismiss a claim that was manifestly without merit. It was noted that by making that clear, the guidance text would make it easier for an arbitral tribunal to exercise such power.

First paragraph

15. While a view was expressed that the first paragraph was not necessary as it repeated article 17 of the UNCITRAL Arbitration Rules and paragraph 8 of the Notes, there was general support for retaining the paragraph as it provided a useful introduction on the discretionary powers of an arbitral tribunal. It was stated that the first paragraph rightly stressed the need to balance between the discretionary powers of the arbitral tribunal and the due process requirements to be observed.

16. After discussion, the Working Group approved the substance of the first paragraph.

Second paragraph

17. With regards to the second paragraph, it was suggested that defences should also be the subject of early dismissal. While doubts were expressed noting that dismissal of a defence would unduly limit a respondent from defending itself and could lead to delays, it was generally felt that the paragraph should be sufficiently broad and

[5] *Ibid.*, paras. 194 (b) and 226–229.

mention the possibility for an arbitral tribunal to dismiss a defence in addition to a claim.

18. On the standard to be applied for dismissing a claim or a defence, there was a broad support that the second paragraph should not introduce a more stringent "manifestly without legal merit" standard found in certain arbitration rules. It was generally felt that the non-inclusion of the word "legal" would broaden the scope of application and also provide an arbitral tribunal with the discretion to dismiss issues of fact or law supporting a claim or a defence.

19. In light of the above, it was suggested that the last sentence of the second paragraph should be deleted. In support, it was mentioned that the sentence did not provide clear guidance on how an arbitral tribunal should address issues of fact or law supporting a claim without legal merit as well as the possible consequences of finding them to be manifestly without merit. It was further mentioned that few arbitration rules contained such language, while another view was that the second paragraph should be broadened to refer to such rules.

20. After discussion, the Working Group agreed that: (i) a defence should equally be the subject of early dismissal; (ii) the standard of early dismissal should be "manifestly without merit" not including the word "legal"; and (iii) the last sentence should be deleted. Subject to those changes, the Working Group approved the substance of the second paragraph.

Third paragraph

21. With regard to the third paragraph, concerns were expressed about an arbitral tribunal dismissing a claim on its own initiative as that would result in a pre-judgment of the case, which would also run contrary to the principle of independence and impartiality of the arbitral tribunal. It was, therefore, suggested that such power should be exercised only upon the request by a disputing party. Another view that an arbitral tribunal should be able to do so only after inviting the parties to express their views and with justifying grounds. It was mentioned that there might be instances where an arbitral tribunal would need to initiate the process on its own initiative and that this possibility should be captured in the paragraph.

22. In response, it was clarified that the third paragraph intended to address the right of the disputing parties to request the initiation of an early dismissal process and that it would be equally useful for an arbitral tribunal to initiate the process on its own initiative considering that the necessary safeguards were provided in the following paragraphs. Accordingly, it was suggested that the third paragraph should be revised to clarify those points.

23. With regard to the time frame within which a party should raise a plea for early dismissal, it was widely felt that the party should be required to do so as promptly as possible after the submission of a claim or a defence. While it was said the paragraph should outline the consequences of when a party did not meet the time frame, it was felt that there was no need to provide such clear language in a guidance text.

24. With regard to when a tribunal could initiate the process on its own initiative, it was generally felt that the tribunal could do so at any stage of the proceeding but should do so at an early stage of the proceedings to enhance the efficiency of proceedings, as indicated in footnote 4.

25. After discussion, the Working Group agreed that the third paragraph should be revised to state that: (i) the process of early dismissal could be initiated by a party or by the arbitral tribunal, with the latter being subject to inviting the parties to express their views; (ii) a party raising such a plea should do so as promptly as possible after the submission of a claim or a defence; and (iii) it would be advisable for an arbitral tribunal to initiate the process at an early stage of the proceedings to enhance the efficiency of the proceedings.

Fourth paragraph

26. It was generally felt that as embodied in article 23 of the UNCITRAL Arbitration Rules, an arbitral tribunal generally had the power to rule on its own jurisdiction, whether ruling on a party's plea that the arbitral tribunal did not have jurisdiction or upon raising the issue to the parties on its own initiative. Therefore, it was suggested that the claims relating to jurisdiction need not be addressed in the guidance text on early dismissal as separate rules governed the issue of jurisdiction. Accordingly, it was suggested that paragraph 4 should be deleted.

27. On the other hand, it was suggested that the paragraph should clarify that, even if a party could raise a plea that a claim was "manifestly" outside the jurisdiction of the tribunal in accordance with the early dismissal procedure and the relevant standard, this should not affect the ability of an arbitral tribunal to raise or resolve a jurisdictional question under the standard provided for and in pursuant to article 23 of the UNCITRAL Arbitration Rules.

Fifth paragraph

28. It was stated that the third sentence of the fifth paragraph suggested a preference for a two-stage process to determine a plea for early dismissal, while practice varied. It was suggested that flexibility should be provided to arbitral tribunals in determining the appropriate procedure. However, it was said that a party raising an early dismissal plea should be required to provide justifying grounds and that only when such grounds were demonstrated, should the arbitral tribunal make a determination. In response, it was noted that as a guidance text, the paragraph should not be prescriptive particularly as there was no underlying rule. Accordingly, it was suggested that the third sentence could be revised along the following lines: "The arbitral tribunal would typically require the party raising the plea to provide justifying grounds and may further require the party to demonstrate that a ruling …".

29. It was further agreed that the example in parentheses in the penultimate sentence could be deleted (see paras.19-20 above).

30. Subject to those suggestions, the Working Group approved the substance of the fifth paragraph.

Sixth paragraph

31. With regard to the first sentence of the sixth paragraph, it was widely felt that an arbitral tribunal should be obliged to invite the parties to express their views and thus a suggestion was made that the phrase "will typically" should be replaced with the word "should". On the other hand, with regard to the second part of that sentence dealing with providing guidance on the procedure, it was generally felt that the sentence should indicate the usual practice by adding the words "would typically" before the words "provide guidance". It was further suggested that an additional sentence should be inserted to provide guidance on the time frame to be indicated by an arbitral tribunal, which could read along the following lines: "The time frame should be reasonably short yet sufficient for the arbitral tribunal to make the ruling as the objective is it streamline the proceeding."

32. Subject to those suggestions, the Working Group approved the substance of the sixth paragraph.

Seventh paragraph

33. As a guidance text, it was suggested that the seventh paragraph should not be prescriptive. It was further suggested that the second sentence of the third paragraph should be placed in this paragraph as it explained the process for an arbitral tribunal to dismiss a claim or a defence. In view of the importance of a reasoned ruling, it was suggested that the following sentence should be added: "It is advisable for the arbitral tribunal to state the reasons, unless the parties have agreed that no reasons are to be given".

34. It was further suggested that the seventh paragraph could indicate that a decision on early dismissal could take the form of an order or an award on the merits, which would largely depend on whether the plea was accepted or not. While a view was expressed that the last sentence of the paragraph should be deleted, it was explained that the last sentence aimed to address a situation where an arbitral tribunal, after the early dismissal process, considered that no award could be rendered in favour of a party and would thus order the termination of the proceedings. In response, it was said that the paragraph should also illustrate a situation where the proceedings would continue with regard to any remaining claims that were not dismissed. Considering that the text aimed to provide guidance, it was agreed that the seventh paragraph should be expanded to capture different situations.

35. Subject to those suggestions, the Working Group approved the substance of the seventh paragraph.

Eighth paragraph

36. While a suggestion was made that a claimant should be allowed to raise the same claim that was dismissed at a later stage of the proceedings yet only in an exceptional change of circumstances, it was generally felt that such a possibility would defeat the purpose of the early dismissal process, which imposed a high threshold for dismissing a claim. In a similar context, it was mentioned that the reference to the "same" claim could be understood differently depending on the circumstances and in different jurisdictions.

37. It was generally felt that the second sentence of that paragraph was not necessary and could be deleted (see paras. 19-20 and 26 above). Subject to that suggestion, the Working Group approved the substance of the eighth paragraph.

Ninth paragraph

38. The Working Group approved the substance of the ninth paragraph.

Other issues

39. While a suggestion was made that the guidance text should address whether the decision by the arbitral tribunal on early dismissal should be subject to recourse or review, it was mentioned that it would not be appropriate for the guidance text to address an issue of policy, considering the divergence in approaches.

C. Way forward

40. After discussion, the Working Group requested the Secretariat to prepare a revised version of the guidance text as an additional note in the Notes to be considered briefly by the Working Group at its next session before it was presented to the Commission. As a general point, it was emphasized that efforts should be made to raise awareness about the Notes and the inclusion of the new note on early dismissal once adopted by the Commission.

41. The Working Group was informed that Working Group III (Investor-State Dispute Settlement Reform) was also addressing the topic of early dismissal as it developed procedural reforms to enhance the efficiency of investor-State dispute settlement (see section II.A of document A/CN.9/WG.III/WP.214). In that light, the Secretariat was requested to inform Working Group III of the current deliberations and to share the revised guidance text on early dismissal for reference.

42. In that context, a suggestion was made that the guidance text could make reference to existing rules on early dismissal applicable to investor-State arbitration and further note that the guidance would not be applicable in proceedings under such rules. However, considering the non-binding and generic nature of the Notes which was already reflected in the introduction of the Notes, it was generally felt that such aspects did not need to be highlighted in the separate note on early dismissal.

IV. Consideration of technology-related dispute resolution and adjudication (A/CN.9/WG.II/WP.227)

A. General remarks

43. With regard to the mandate of the Working Group (see para. 2 above), views were expressed that the work should not be limited to preparing a mechanism to resolve disputes within the framework of the Expedited Rules. It was said that limiting the scope of work would not allow to capture the full benefits of adjudication (which provided for a quick process to resolve a dispute by an adjudicator and required the losing party to comply with that decision, but with a possibility to object to the decision and have the matter decided anew at the end of a project). It was also said that it would be prudent to consider adjudication as a process separate from expedited arbitration, possibly to resolve technology-related disputes. In response, it was emphasized that the Working Group was requested to consider ways to further accelerate the resolution of disputes by incorporating elements of both proposals on adjudication and technology-related dispute resolution. It was further recalled that the Commission requested that the work build on the Expedited Rules and stressed that the work should further extend their use.

44. The Working Group decided to consider document A/CN.9/WG.II/WP.227 as the basis of its discussion along with A/CN.9/WG.II/WP.228, which contained a proposal from the Government of Israel.

45. A wide range of views were expressed on the legal framework within which the draft model clauses would operate.

46. Noting that the model clauses had been prepared to operate in the context of expedited arbitration, it was said that one approach would be that the overall process should operate within the framework of the UNCITRAL Arbitration Rules or the Expedited Rules, while certain elements of adjudication could be introduced in the arbitration process. In support, it was said that such an approach would ensure that the framework for enforcing arbitral awards could be utilized and that work could focus on ways in which the disputing parties could tailor the process to their needs. In addition, it was said that the Working Group should take caution not to introduce elements which were at odds with the arbitration process and that the process should function under a predictable framework.

47. Another approach was to introduce a pre-arbitration process akin to adjudication or a form of fast-track arbitration, which could be followed by a full-fledged arbitration under certain conditions. It was stated that such an approach would allow for decisions to be made by third-party experts in a short time frame while the parties would retain the possibility to pursue arbitration afterwards. In support, it was stated that that approach could realize the full advantages of adjudication, including for technology-related disputes. However, it was said that that approach would require the Working Group to formulate the underlying framework or contractual arrangement governing the pre-arbitration process (for example, the appointment of the third-party expert), which might not be within the mandate of the Working Group and one that was not necessarily known in all jurisdictions. It was suggested that while innovative solutions should be sought, they should be consistent with the existing UNCITRAL framework.

48. It was widely felt that the text to be prepared by the Working Group would largely depend on the approach to be taken, but that it was premature to take a decision on one of the approaches at the current stage. It was noted that efforts should generally be made to bridge the gap between the two approaches or possibly work on the two approaches in parallel.

49. During the deliberation, a number of preliminary comments were made.

50. It was stated that if the dispute resolution process were to consist of two phases, the decision in the first phase should not be rendered by the arbitral tribunal rendering the final award. It was said that the impartiality and independence of the decision makers in both phases would need to be preserved and that the arbitral tribunal should not delegate its decision-making function (see para. 70 below).

51. It was widely felt that the decision in the first phase should be made by a third-party individual with technical expertise. It was suggested that such a decision should be referred to as a decision or determination rather than an award.

52. It was said that the decision in the first phase should be made in a short time frame and not be final, while the relevant matters could be decided anew during the second phase. It was also said that the parties should be required to comply with that decision in order to initiate the second phase, which could be in accordance with the UNCITRAL Arbitration Rules or the Expedited Rules.

53. While views were expressed that the enforceability of the decision in the first phase could rely on the contractual agreement between the parties and their voluntary compliance, it was stated that ensuring the enforceability of that decision, including across borders, should be a key component of the work. In that context, ways to transform that decision into a final and binding award when the parties did not object to it were mentioned (see para. 62 below).

54. It was suggested that the model clauses should generally operate independent of each other, while they could be presented as a set of clauses. It was also said that the Working Group should be mindful that one of the aims of its work was to facilitate the resolution of technology-related disputes, while the model clauses could be used for a broad range of disputes.

55. More generally, it was emphasized that the work should address the needs of the users and aim to provide the parties with the flexibility to tailor the process to their needs.

B. Possible model clauses

1. Time frames and the outcome of the proceedings (A/CN.9/WG.II/WP.227, model clause 1)

56. With regard to paragraph 1, it was generally felt that the decision in the first phase should be rendered within a short time frame. While a view was expressed that as a model clause, it should be left to the parties to agree on the time period, another view was that a fixed time period (for example, 60 days) should be suggested. As to when that time frame should commence, it was stated that that would largely depend on how the first phase was to be conducted. It was further stated that if the first phase were to be a non-arbitration process, the time frame should not be linked to the constitution of the arbitral tribunal. Views were expressed that the time frame could commence with the appointment of the first-phase decision maker, the submission of the statement of claim or of the statement of defence, or when the dispute arose. It was also suggested that there should be a mechanism for the decision maker to extend the time frame in exceptional circumstances.

57. In contrast, it was noted that the second phase whereby the subject matter of the decision rendered in the first phase would be decided anew would not need to be as short and that the parties should be free to determine whether to rely on the Expedited Rules, the UNCITRAL Arbitration Rules or other proceedings. It was said that the arbitration process in the second phase should not be to revise the decision rendered in the first phase, but to allow for a de novo review of the dispute, resulting in an enforceable award.

58. The view was reiterated that the decision rendered in the first phase should not be by an arbitral tribunal but rather by a third-party appointed by the parties or other competent authority to ensure the independence and impartiality of the decision

makers in both phases (see paras. 50-51 above). Accordingly, doubts were expressed about paragraph 1 referring to that decision as a preliminary award.

59. On how to appoint decision makers in the first phase, it was stated that there should be a mechanism to appoint them quickly, with the possibility of the parties agreeing on them prior to the dispute possibly in the underlying contract or agreeing on the mechanism or a competent authority to appoint them. The establishment of a dispute settlement board was also provided as an example. It was generally felt that an arbitral tribunal should not have the authority to appoint the decision makers of the first phase.

60. It was generally felt that the parties should be obliged to comply with the decision rendered in the first phase. It was noted that when the parties complied with that decision, there would be little need to make that decision final and binding or enforceable, while there should be such a mechanism when the parties did not comply with that decision.

61. It was felt that paragraph 2 provided one such mechanism – if the parties did not object within a short period of time after the decision was rendered, the decision would become final. On the other hand, it was suggested that there should not be a fixed time period within which the parties needed to object, particularly when long-term contracts were involved.

62. Concerns were raised that if the decision in the first phase was not rendered by an arbitral tribunal, its enforcement could only be based on a contractual remedy. It was stated that if parties were required to enforce the decision and the contractual arrangement in domestic courts, that would defeat the purpose of imposing a short time for the first phase. Accordingly, suggestions were made on how that decision could be characterized as or transformed into an award, which would allow the parties to benefit from enforcement mechanisms under domestic arbitration laws as well as the New York Convention. On the other hand, doubts were expressed about whether domestic courts would consider such a decision or award to be enforceable. In that context, it was said that if the enforcement mechanism for the decisions of the two phases were to be different, that could have an impact on the compliance of those outcomes by the parties.

63. With regard to paragraph 3 which dealt with the requirements to be met by a party in order to object to the decision rendered in the first phase, it was generally felt that a party should be required to first comply with the decision in order to raise the objection and to bring the dispute before an arbitral tribunal. Some doubts were expressed about the meaning of the word “commitment” to carry out the decision and whether a commitment should be sufficient. In response to concerns that a party that had committed might eventually not comply with the decision, allocating costs of the first phase was suggested as a possible sanction.

64. It was mentioned that the requirement imposed on the parties in paragraph 3 to resort to arbitration following the first phase could raise concerns about limiting their rights to access to justice. It was questioned whether the party that had prevailed in the first phase would be free to resort to arbitration to obtain an enforceable award against the non-complying party. In that context, the extent to which the non-complying party would be able to participate in that arbitration, considering that the requirements in paragraph 3 would not have been met, was questioned.

65. As the aim of the work should be to resolve a dispute in a very short time frame with the outcome being enforceable across borders, it was suggested that a number of the above-mentioned concerns could be addressed by containing the entire process under the Expedited Rules with the model clause allowing the parties to agree on a shorter time period within which the arbitral tribunal would be required to render an award. It was said that such an option could provide an alternative to the two-phase process involving a non-arbitration first phase.

66. It was also suggested that the Working Group should consider embedding within the arbitration framework an expert determination phase – for example, arbitration

would commence followed by a determination by an expert or experts within a short time frame (during which the arbitration process might be stayed), which would be binding on the parties unless objected to. It was said that if the parties objected, the arbitral tribunal would then render an award in accordance with the Expedited Rules. In that context, reference was made to Arb-Med-Arb protocols, which could shed light on how the process could be conducted.

67. As a general remark, it was suggested that efforts should be made to develop a process which would operate within the existing UNCITRAL framework on dispute settlement.

2. Appointment and the role of experts and neutrals (A/CN.9/WG.II/WP.227, model clause 2)

68. It was noted that a way to ensure a quick resolution of the dispute was to appoint decision makers and arbitrators that would have the expertise to render a decision in a short time frame. However, it was noted that it might be necessary to engage experts to assist them on certain matters, which model clause 2 aimed to address.

69. With regard to paragraph 1, it was mentioned that if expert witnesses were to be appointed jointly by the parties, that would reduce the cost and time of each party appointing its own experts and could facilitate a quicker resolution by the arbitral tribunal. In this regard, it was suggested that there should be a short time frame within which the parties would need to agree on an expert witnesses (including possibly prior to the dispute) and a mechanism to address a situation where the parties were not able to agree. It was further suggested that the parties might exchange a list of candidates to identify the suitable expert witness or indicate the qualifications required. It was stated that upon the lapse of the time frame, the arbitral tribunal should be able to appoint the expert witness. In this regard, it was stated that depriving the parties of the right to appoint their own expert witnesses could be problematic. Similarly, it was noted that if paragraph 1 were intended to modify existing rules in the UNCITRAL Arbitration Rules or the Expedited Rules, that interaction should be explained.

70. With regard to paragraph 2, it was generally felt that an arbitral tribunal should not delegate its decision-making function to a third person. In that context, it was suggested that the reference to a “neutral” (an individual who would be assigned to make decisions on behalf of the tribunal) should be avoided. It was suggested that paragraph 2 should instead list the possible functions or duties that could be carried out by “experts”. With regard to a suggestion that the model clause should include rules on the conduct of the experts including possible challenges, it was said that article 29 of the UNCITRAL Arbitration Rules addressed those aspects.

71. With regard to paragraph 3, it was suggested that statements by expert witnesses jointly presented by the parties as well as reports of experts appointed by the arbitral tribunal should not be binding on the arbitral tribunal and that instead they should provide the necessary information for the arbitration tribunal to take decisions. Questions were raised about the phrase “take due account”, including the weight to be given by the arbitral tribunal to such statements or reports.

3. Confidentiality (A/CN.9/WG.II/WP.227, model clause 3)

72. Considering that the UNCITRAL Arbitration Rules and the Expedited Rules did not contain a general provision on confidentiality, there was general support for a model clause on confidentiality for use by the parties, particularly with regard to technology-related disputes.

73. There was general support for paragraph 1, which addressed outbound confidentiality. However, a number of suggestions were made. One was that the persons bound by the obligation would need to be clearly set out as well as to whom the information should be kept confidential (for example, third parties). It was further suggested that the meaning of the phrase “all aspects of arbitration” was ambiguous and that it might be useful to outline aspects that would need to be kept confidential.

While a suggestion was made that the list of exceptions could be further expanded (for example, with regard to information publicly available, when there was threat to life and a need to disclose the commission of a crime), it was mentioned that they might already be covered by the exceptions in paragraph 1. In that context, questions were raised on the meaning of "legal duty" mentioned in that paragraph.

74. Considering that the model clause could be binding only on the parties and the arbitral tribunal, it was suggested that means to ensure that others involved in the proceedings would be subject to the same confidentiality standard should be sought, including requiring them to sign a written undertaking of confidentiality.

75. With regard to paragraph 2, it was stated that the paragraph would address a situation where one of the parties did not wish to disclose sensitive information to the other party or others involved in the arbitral proceeding. In that context, it was suggested that to whom the information should be kept confidential might need to be clearly set out in the paragraph.

76. On the other hand, it was questioned whether it would be possible to not disclose such information to the other party, which might limit the opportunity to defend its case and raise due process concerns. It was mentioned that there might be a wide range of different scenarios, for example, where the information was disclosed only to the arbitral tribunal, to an expert to report on the information or to the legal representative of a party.

77. More generally, it was said that inputs should be sought from the industry on the need for a mechanism to ensure inbound confidentiality. Considering that the modalities for the parties to provide such a mechanism would vary, it was suggested that the relevant issues might better be presented in a guidance text, whereas model clause 3 would consist of a short paragraph on outbound confidentiality.

78. It was noted that arbitral tribunals generally had limited tools to ensure the maintenance of confidentiality particularly after the proceeding and to sanction any breach. It was further said the same would apply to decision makers in a non-arbitration process. In that context, it was cautioned that the model clause and the guidance text on confidentiality should not rule out the possibility for courts to address the breach of confidentiality.

4. Case management conference (A/CN.9/WG.II/WP.227, paras. 45–48 and A/CN.9/WG.II/WP.228, para. 2)

General

79. With regard to the topics of case management conference (CMC) and evidence, it was noted that both topics were presented as guidance material in document A/CN.9/WG.II/WP.227 as they dealt with the conduct of the proceedings by the arbitral tribunals and were usually not addressed in the agreement of the parties modifying or supplementing the applicable arbitration rules. In contrast, it was stated that there could be merit in preparing model clauses on those topics, which would be easily accessible and utilized by the parties to agree on specific aspects of the arbitration procedure. It was further stated that model clauses could obtain more attention than guidance texts. It was on that basis that the model clauses on those topics were presented in document A/CN.9/WG.II/WP.228 for consideration by the Working Group.

80. In response, it was stated that while model clauses should allow parties to modify the applicable rules to tailor the proceedings to their needs, they should not alter the underlying structure, in which case preparing a separate set of rules would be the preferred route. In a similar vein, it was stated that model clauses should not be prescriptive nor aim to overregulate the procedure.

81. It was also stated that if model clauses were to shorten the time frames within the Expedited Rules to further accelerate the proceedings, they should be prepared in a comprehensive manner to address all respective time frames. It was said that in that

case, model clauses addressing different time frames should be presented as an entire set to be used by the parties. At the same time, reference was made to other existing rules which contained a short time frame to render a decision without mentioning time frames for the respective stages.

82. With regard to whether the shortened time frames (see para. 81 above) could apply to a non-arbitration first phase process, one view was that they could be applied equally, while another view was that the time frame could be shorter as the decision rendered in the first phase would not necessarily be final and that process might not need to address all due process concerns. It was suggested that rules and procedures developed by other organizations should be consulted and that consideration could be given to developing text for the arbitration and non-arbitration processes in parallel.

83. Another suggestion was that the different texts being prepared by the Working Group could be formulated into a toolkit, which parties could use in a flexible manner.

Case management conference

84. It was generally felt that CMCs were a useful tool to accelerate the proceedings and elements outlined in the guidance material as well as the model clause (A/CN.9/WG.II/WP.228, para. 2) applied generally to all types of proceedings and not only those for technology-related disputes.

85. With regard to the model clause on CMCs, questions were raised whether and how the model clause would modify the Expedited Rules. For example, it was noted that article 9 of the Expedited Rules required the arbitral tribunal to consult the parties, through a CMC or otherwise, "promptly after and within 15 days" of its constitution whereas paragraph 1 of the model clause required the arbitral tribunal to hold an initial CMC "as soon as possible" after the constitution. It was also mentioned that the time frame for rendering a decision in model clause 1 would need to be taken into account when preparing the model clause on CMCs, as the time frame would likely be much shorter than that provided for in the Expedited Rules. Suggestions were made that the initial CMC should be held, for example, within 7 days of the constitution of the arbitral tribunal.

86. With regard to paragraph 2, it was suggested that the parties should be able to propose issues to be discussed at the CMC within a short time frame prior to the CMC (for example, 2 or 3 days). Concerns were expressed about paragraph 3 stating that a respondent might not be in the same position as a claimant with regard to identifying experts to attend the initial CMC held in a very short time frame.

87. With regard to the issues to be discussed during an initial CMC, it was stated that the applicable law and the language of the proceedings should be added to the list. On the other hand, it was stated that the issues to be discussed at the initial CMC varied greatly depending on the case and doubts were expressed about including a list, even if it was intended to be illustrative only. It was suggested that the list of issues could instead be presented in a guidance text.

88. In light of the above, it was generally felt that the model clause on CMCs should be simplified to indicate a short time frame within which the initial CMC was to be held and to give the parties the opportunity to suggest issues to be discussed prior to the CMC. It was also agreed that the remaining aspects (including the list of issues to be discussed) could be presented as guidance text to that model clause.

5. Evidence (A/CN.9/WG.II/WP.227, paras. 52–54 and A/CN.9/WG.II/WP.228, para. 10)

89. It was explained that the model clause on evidence addressed three different aspects relating to evidence that: (i) "data" and "technical information" should also fall under the term "evidence"; (ii) there could be different means of taking evidence including by experiment, demonstration or trials; and (iii) parties would be obliged to disclose the use of technology, including artificial intelligence, in analysing,

processing and presenting evidence, with the possibility for the other party to object to such use.

90. With regard to the first aspect, it was stated that "metadata" could also be mentioned. With regard to the second aspect, it was mentioned that such means of taking evidence was already being used by arbitral tribunals and not necessarily limited to technology-related disputes. It was said that inclusion of paragraph 2 should not be interpreted as depriving the arbitral tribunal under the Expedited Rules or the UNCITRAL Arbitration Rules to order such ways of taking evidence when there was no express agreement by the parties.

91. With respect to the third aspect, concerns were raised about imposing an obligation on the parties to make the disclosure, which could be burdensome and possibly result in limiting their use of technology. It was said that the issues addressed in paragraph 3 raised substantive policy questions, which should be captured in a rule if there was any agreement by the Working Group on the appropriate approach. Particular concern was raised with regard to the term "artificial intelligence", which was understood variously and posed other issues. It was generally felt that texts to be prepared should be technology-neutral and that the use of technology in dispute resolution should be viewed from a broader perspective and not only in the context of taking evidence. It was also stated that manipulated or potentially falsified evidence was a growing concern in a wide range of arbitral proceedings and guidance could also be useful outside the realm of technology-related disputes.

92. In light of the above, it was suggested that the matters relating to evidence could be better addressed in a guidance text that would not only tailor for technology-related disputes but more broadly to other types of disputes. In that regard, it was stated that further consultations with the users would be useful.

C. Way forward

93. After discussion, the Working Group requested the Secretariat to revise the model clauses 1 to 3 for further consideration by the Working Group. With regard to the topic of CMC, the Secretariat was requested to prepare a short model clause to be accompanied by a guidance text, for example, listing issues that could be discussed during an initial CMC. With regard to the topic of evidence, the Secretariat was requested to provide a guidance text for further consideration by the Working Group.

94. Considering that the above-mentioned texts did not necessarily aim to address technology-related disputes resolution nor adjudication, it was stated that the texts could be presented more generally as those aimed to further accelerate and ensure effective dispute resolution. In that context, the Secretariat was requested to (i) illustrate how the model clauses and the guidance text would interact with existing UNCITRAL texts (for example, how the model clauses would modify the articles of the Expedited Rules and the timeline); (ii) ensure that the model clauses were prepared in a coherent manner; and (iii) suggest ways to present the guidance text.